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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

GEORGE E. FLAGG,

Petitioner,

vs.

UNITED STATES OF AMERICA, AND ROBERT BEISNER, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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COUNSEL OF RECORD

QUESTIONS PRESENTED

1. WHETHER THE INTERNAL REVENUE SERVICE HAS THE AUTHORITY TO ISSUE A SUMMONS IN SUPPORT OF A § 7601 TAXPAYER'S COMPLIANCE MEASUREMENT PROGRAM AUDIT.

TABLE OF CONTENTS

	PAGE
Questions Presented.....	i
Affidavit of Service.....	iv
Opinions Below.....	2
Jurisdiction.....	2
Statutory Provisions.....	3
Statement of the Case.....	3
Reasons for Allowance of Writ.....	8
Conclusion.....	22
Appendix A.....	A-1
Appendix B.....	B-1

TABLE OF AUTHORITIES

Cases

United States v. Armour, 376 F.Supp. 318 (Conn. 1974).....	20-21
United States v. Bisceglia, 420 U.S. 141 (1975).....	19-20
United States v. Coopers & Lybrand, 550 F.2d 615 (10th Cir. 1977)...	21

United States of America vs. First National Bank in Dallas, 468 F. Supp. 415 (N.D. Tex. 1979) reversed and remanded, _____F.2d _____, (5th Cir. No. 79-2420, January 26, 1981)..... 17,18,20

United States v. Flagg, _____ F.2d _____, (8th Cir. No. 80-1018, November 13, 1980)..... 15,18,19

United States v. Humble Oil & Refining Co., 488 F. 2d 953 (5th Cir. 1974) vacated and remanded, 421 U.S. 943, 95 S.Ct. 1670, 44 L.Ed. 2d 97 (1975) aff'd per curiam, 518 F.2d 747 (5th Cir. 1975)..... 15,16,17 18,19,20

United States v. LaSalle National Bank, 437 U.S. 298 (1978)..... 12,13,14

Statutes

Title 26 U.S.C. Section 7402(b)..... 5

Title 26 U.S.C. Section 7601..... 8

Title 26 U.S.C. Section 7602.....12,14,15,17

Title 26 U.S.C. Section 7604(a)..... 5

Title 26 U.S.C. Section 7801..... 8

Title 26 U.S.C. Section 7802..... 8

Title 28 U.S.C. Section 1254(1)..... 3

Title 28 U.S.C. Section 2101(c)..... 3

Other Authorities

III Audit C.C.H. Int. Rev. Manual

Part IV, Para 4861.1..... 9, 10

AFFIDAVIT OF SERVICE

STATE OF IOWA)
)SS
COUNTY OF POLK)

I, James R. Cook, depose and state that I am counsel of record for George E. Flagg, the petitioner herein. Pursuant to Rule 28, Rules of the Supreme Court, I served one copy of the following Petition for a Writ of Certiorari on each of the parties required to be served herein as follows:

On the United States of America, respondent herein, by mailing one copy in a duly addressed envelope with first class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

On the Internal Revenue Service, respondent herein, by mailing one copy in a duly addressed envelope with first class postage prepaid, to M. Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 20530.

On Robert Beisner, Revenue Agent, respon-

dent herein, by mailing one copy in a duly addressed envelope with first class postage prepaid, to Robert Beisner, Internal Revenue Service, 210 Walnut Street, Des Moines, Iowa 50309.

James R. Cook

JAMES R. COOK
3914 SW 9th Street
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(515) 243-8732

COUNSEL OF RECORD

Subscribed and sworn to before me this 10 day of February, 1981.

Notary Public - State of Iowa

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

GEORGE E. FLAGG,

Petitioner

vs.

UNITED STATES OF AMERICA AND ROBERT BEISNER, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

George E. Flagg, petitioner herein, prays that a writ of certiorari issue

to review the judgment of the United States Court of Appeals Eighth Circuit entered in the above case on November 13, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Iowa, Central Division, is not reported and is contained in Appendix A, infra, Appendix A2. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at _____F.2d _____ (8th Cir. 1980) and is contained in Appendix A, infra App. A_____.

JURISDICTION

The order of the United States District Court was entered on November 8, 1979. After appeal by the Respondents herein, the judgment of the United States Court of Appeals, Eighth Circuit, was entered on November 13, 1980. The jurisdiction of the Supreme Court is invoked

under the provisions of Title 28 U.S.C. Section 1254(1) and Title 28 U.S.C. Section 2101(c).

STATUTORY PROVISIONS

The pertinent statutes of the United States of America are set forth in Appendix B at Page B-2.

STATEMENT OF THE CASE

On or about April 5, 1978, petitioner, George E. Flagg, was contacted by Mr. Robert Beisner, Respondent herein, and Revenue Agent of the Internal Revenue Service, and informed that his 1976 tax return had been selected for the Taxpayer Compliance Measurement Program and that he would be auditing Mr. Flagg solely for that purpose. A number of meetings were held between Mr. Flagg and Mr. Beisner during the period of April to September, 1978. At the first meeting on April 25, 1978, in the presence of Mr. Flagg's sons, Jeffrey Flagg, a practicing attorney,

and Brian Flagg, Certified Public Accountant, Mr. Beisner informed Mr. Flagg that he was to do a "detailed examination" of his Form 1040 and stated that the reason or authority for the examination was the TCMP program. Mr. Flagg refused to voluntarily submit to this request in that it would require a great deal of time and inconvenience for him, would destroy the confidentiality of his tax return and for the reason that the Internal Revenue Service had no lawful basis to compel him to submit to such procedure.

Mr. Flagg and Mr. Beisner had meetings on at least several occasions regarding Mr. Flagg's challenge to the legality of the TCMP program and Mr. Flagg also requested a legal opinion from the Internal Revenue Service setting forth their authority which would compel him to submit to such a procedure.

On September 27, 1978, a summons

was issued by Mr. Beisner directing Mr. Flagg to appear before him on October 27, 1978 with various records necessary to substantiate his 1976 tax return. Mr. Flagg refused to comply and on March 6, 1979, a Petition to Enforce Internal Revenue Summons was filed in the United States District Court for the Southern District of Iowa, Central Division, alleging that jurisdiction lied in that Court under Title 28 U.S.C. Sections 7402(b), 7604(a). On March 8, 1979, an Order to Show Cause ordering Mr. Flagg to appear and show cause why he should not be compelled to produce the records demanded in the summons was issued by that Court. On March 15, 1979, Mr. Flagg appeared and answered by his attorney setting forth the basis for his refusal to comply.

On April 3, 1979, hearing was held before Magistrate R. E. Longstaff. At that hearing, the Internal Revenue Service presented the testimony of Mr. Beisner

and Mr. Larry Lawson, Returns Program Manager and TCMP Manager for the Des Moines, Iowa District. The defense presented the unrefuted testimony of Mr. Flagg.

On April 20, 1979, Magistrate Longstaff issued his report and recommendation granting in part and denying in part the summons. On April 27, 1979, Mr. Flagg filed an Application for Hearing and Application for Delay requesting that he be afforded the opportunity to present further evidence concerning the finding that proper administrative steps and procedures were followed and that the recommendation that the IRS summons be honored on that basis. On May 4, 1979, the Internal Revenue Service filed an Objection to and Motion for Review of Magistrate's Report and Recommendation. In accordance with those requests, a hearing was held before Honorable Donald E. O'Brien, Judge, on the 18th day of

July, 1979. At the July 18, 1979 hearing, Mr. Flagg was sworn to the testimony given before Magistrate Longstaff in April 3, 1979 hearing, and Mr. Jeffrey Flagg testified in corroboration of his father and Mr. Larry Lawson again testified further for the government. On November 8, 1979, the Honorable Donald E. O'Brien, Judge of the United States District Court for the Southern District of Iowa, Central Division, entered an Order denying the Petition for Enforcement and dismissing the cause.

On January 4, 1980, the Respondents herein filed a timely Notice of Appeal. After all required Briefs were filed, the case was submitted to the United States Court of Appeals for the Eighth Circuit on September 9, 1980 and that Court filed its opinion on November 13, 1980 reversing the District Court's Order and remanding the cause to the United States District Court in and for the

Southern District of Iowa, Central Division, with instructions to enforce the summons.

REASONS FOR ALLOWANCE OF WRIT

I.

The United States District Court correctly held that the Internal Revenue Service was not conducting an investigation of the Petitioner, but was involved solely in a research function for which no subpoena power lies under Title 26 U.S.C. Section 7601.

Mr. Flagg does not dispute that Congress delegated to the Secretary of the Treasury and the Commissioner of the Internal Revenue Service the responsibility for enforcing and administering the Internal Revenue Service Code. 26 U.S.C. Section 7801, 7802. The IRS Code provides in Section 7601:

> "§7601. Canvass of districts for taxable persons and objects
>
> (a) General rule. The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Depart-

> ment to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons owning or having the care and management of any objects with respect to which any tax is imposed."

As a result of, and by the authority of, Section 7601, the Internal Revenue Service has devised as program known as the Taxpayer Compliance Measurement Program (TCMP). III Audit C.C.H. Int. Rev. Manual, Part IV, Para. 4860 Et seq. The purpose of the TCMP as set forth in Paragraph 4861.1(1) and (2):

> "Background
> (1) The Service requires an accurate measure of its workload and its major characteristics to effectively plan long-range programs for enforcement of the Federal tax system. The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of its limited resources can be evaluated. IRM 125 (18) 4:(2) places responsibility for timely completion and quality control of this program upon apropriate regional and district officials.
>
> (2) TCMP can be described as a scientific research system for measurement and evaluation of taxpayer compliance characteristics. The major uses of

> TCMP data are to measure the levels of compliance and tax administration gaps necessary for formulation of the Service's long-term enforcement policies; to determine changes in compliance levels over a period of time to properly direct enforcement programs; to develop and improve return selection procedures (Discriminant Function); to improve the effectiveness of enforcement operations; to identify alternative methods of operation; and to achieve greater operating economies."

The District Court found that Robert Beisner, one of the Respondents, testified that he was an Internal Revenue Agent and had been since 1967. The Court further found that his duties involved having returns assigned to him for examination of the records of the taxpayer to determine the correctness of the tax as stated on the tax return. Mr. Beisner stated that he had received the tax return of Mr. Flagg and testified that "the sole reason for selecting Mr. Flagg's return was to consider it in the Taxpayer's Compliance Measurement Program and that he had no other reason for examining the return". The Internal Revenue Service

propounded the position that the summons in this matter was issued in connection with an investigation of Mr. Flagg's 1976 tax liability. The government further stated that the purpose of the summons was and is to obtain information to determine Mr. Flagg's correct tax liability for 1976. The government further propounded that one immediate and undisputed reason why the IRS wants to determine Mr. Flagg's correct tax liability is so that it can collect any additional tax that Mr. Flagg may owe. The government finally submits that the purpose of collecting taxes is legitimate and valid.

The District Court had no argument with the purposes set forth by the government. However, it found, according to the testimony of the Internal Revenue Agent, who was handling the matter, this purpose was not included in his reasons for having the return and for calling the taxpayer in.

The government attempted to differentiate between what the Revenue Agent Beisner said and what he may have had authority to say by citing the case of United States v. LaSalle National Bank, 437 U.S. 298 (1978). In the LaSalle case, the facts are very similar to the case at bar. The Special Agent had issued a summons to the bank to produce certain land trusts. The bank appeared but refused to produce the files and the United States and the agent petitioned the district court for enforcement of the summons. The district court denied enforcement, finding that the summons was not issued in good faith because they were issued solely for the purpose of unearthing evidence of criminal conduct by the taxpayer. The Court of Appeals affirmed. The Supreme Court held at Page 298:

> "...To enforce a summons under §7602, the primary requirement is that it be issued before the IRS recommends to the Department of Justice the initiation of a criminal prosecution

> relating to the subject matter of the summons. This is a prophylactic rule designed to protect the standards of criminal litigiation discovery and the role of the grand jury as the principal tool of criminal accusation. ...
>
> Enforcement of the summons is also conditioned upon the good-faith use of the summons authority by the IRS, which must not abandon its institutional responsibility to determine and to collect taxes and civil fraud penalties. That a single special agent intends only to gather evidence for a criminal investigation is not dispositive of the IRS as an institution. Those resisting enforcement of a summons must disprove the actual existence of a valid civil tax determination or collection purpose by the IRS. ..."

With this case in mind, the District Court found that Mr. Flagg had shown sufficient justification to preclude the enforcement of the summons. This finding was based on the statement of the Revenue Agent that his sole purpose was to further the Taxpayer Compliance Measurement Program and for the further reason that in this case, there is no evidence of any kind indicating that the government had any secondary purpose in pulling Mr. Flagg's tax return. The LaSalle case specifically deals with

the question of propriety of issuing a summons for the purpose of unearthing evidence of criminal conduct. The LaSalle decision really states that a summons may not be issued under §7602 in aid of a solely criminal investigation, but may be issued when a dual purpose was shown. The District Court found there was no dual purpose here.

The District Court further found that Mr. Flagg has disproved by the admissions of the Internal Revenue Service, the existence of a valid civil tax collection purpose and the Internal Revenue Service has admitted there is nothing to demonstrate a valid criminal tax collection service. The Court therefore held that there can be no dual purpose for the summons. A research purpose which the Internal Revenue Service may deem interesting is not sufficient under the law.

On appeal, the Eighth Circuit Court

of Appeals found that the IRS has the statutory power under 26 U.S.C. §7602 to issue summonses where one good faith purpose is to ascertain the correctness of specific tax returns. United States v. Flagg, _____F.2d _____, (8th Cir. No. 80-1018, November 13, 1980). In its holding, the Court of Appeals distinguished the District Court's reliance upon United States v. Humble Oil& Refining Co., 488 F.2d 953 (5th Cir. 1974), vacated and remanded, 421 U.S. 943, 95 S.Ct. 1670, 44 L.Ed. 2d 97 (1975), aff'd. per curiam, 518 F.2d 747 (5th Cir. 1975).

The Court, in Flagg, stated that the Humble Oil decision does not stand for the broad proposition that the Internal Revenue Service is not allowed by law to examine returns for the purpose of carrying on research.

In Humble Oil, the Internal Revenue Service attempted to employ summons to obtain information merely as a part of

its research concerning non-compliance with certain provisions of the Internal Revenue Code. Neither the Humble Oil Co. nor those about whom the information was sought were the objects of any investigation for non-compliance with the tax law. The Court, in Humble Oil found that the IRS was prompted to conduct its research project by the prospect of non-compliance for tax abuse attendant upon the use lease bonuses. As in the case at bar, the Internal Revenue Service Agent Valentas testified that his research indicated the possibility of lessor non-compliance with the Code requirements concerning restoration of income in relation to lease bonuses. The Court then found that the summons was issued merely to expedite the research process. The IRS had no reason to believe that any of the lessors had failed to properly make their return. The IRS also had not in-

stituted any program to make an industrywide examination as to the compliance with the applicable Code sections. The Humble Oil Court concluded that Section 7602 of the Internal Revenue Code of 1954 only allowed investigations into the correctness of a return; but, that it not allow research into compliance with Code provisions.

Humble Oil was again the foundation for the decision of the District Court in United States of America vs. First Bank in Dallas, 468 F.Supp. 415 (N.D. Tex. 1979) reversed and remanded, _____ F.2d_____, (5th Cir. No. 79-2420, January 26, 1981). There, the Internal Revenue Service brought an action seeking an Order enforcing the summons issued to several taxpayers. After hearing, the District Court held that where the taxpayer's return was selected for examination primarily for research purposes, Petition for Enforce-

ment of Summons issued to taxpayers seeking access to records pertaining to their accounts would be denied. In arriving at its decision in First National Bank, the District Court held that the Internal Revenue Service is not allowed by law to examine returns for the purpose of carrying on research and cited as authority the case of United States vs. Humble Oil & Refining Co., 488 F.2d 953 (5th Cir. 1974); 421 U.S. 943, 95 S.Ct. 1670, 44 L. Ed. 2d 97 (1975), aff'd. per curiam, 518 F.2d 747 (5th Cir. 1975).

On appeal, the 5th Circuit relied upon the 8th Circuit's determination in United States v. Flagg, _____F.2d_____, (8th Cir., No. 80-1018, November 13, 1980), in holding that the enforcement of the summons in First National Bank was sought for a stated purpose of examining the correctness of the specified tax return of named taxpayers. The Court

further noted that the summons issuance was expressly authorized by Section 7602 of the IRS Code and that the circumstance that the audit was motivated to obtain research did not allow the District Court to deny summonses enforcement.

The flaw in both the 5th Circuit's and 8th Circuit's reasoning in First National Bank and Flagg is that in both cases the Court of Appeals have overlooked the fact that the purposes for which the summonses were issued were to attempt to conscript taxpayers into a research project of the IRS.

In the case of United States vs. Bisceglia, 420 U.S. 141 (1975), the Court stated at Page 147:

> "Once a summons is challenged, it must be scrutinzed by a court to determine whether it seeks information relevant to legitimate investigative purpose and is not meant 'to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation'. United States v. Powell, 379 U.S., at 58, 85 S.Ct., at 255, 13 L.Ed. 2d 112."

The Court in Bisceglia held that in determining whether a summons should be enforced it is the District Court's duty to see that a legitimate investigation was being conducted and the summons was no broader than necessary to achieve its purpose.

The concurring opinion of Mr. Justice Blackman, with Mr. Justice Powell joining, specifically recognized and stated the investigation requirement recognized in Humble Oil, supra, and First National Bank, and by the District Court in the instant case at page 153:

> "The summons, in short, was issued pursuant to a genuine investigation. The service was not engaged in researching some general problem; its mission was not exploratory. The distinction between an investigative and a more general exploratory purpose has been stressed appropriately by federal courts, see e.g., United States v. Humble Oil & REfining Co., 488 F.2d 953, (C.A. 5 1974), pet. for cert. pending, No. 73-1827; United States v. Armour, 376 F. Supp. 318 (Conn.

> 1974), and that distinction is important to our decision here. (Emphasis added)"

Therefore, it becomes clear that the IRS is empowered to use its summons power only in cases clearly involving investigation of an individual or organization, not in furtherance of its research projects. United States vs. Coopers & Lybrand, 550 F.2d 615 (10th Cir. 1977).

The justification for the District Court's failure to authorize the summons in the instant case is probably best stated by Magistrate Ronald Longstaff's conclusion, when he stated:

> "The TCMP is a research program. Summons power could easily rise to an awesome intrusion upon private rights wholly apart from any basic needs of government taxation if it were extended to whatever project the Internal Revenue Service might deem interesting. Such an extension of summons power would be oppressive, and is not authorized by law."

For these reasons, a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

GEORGE E. FLAGG

Petitioner

vs.

UNITED STATES OF AMERICA
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INTERNAL REVENUE SERVICE

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA and ROBERT BEISNER, Revenue Agent of the Internal Revenue Service, Petitioner vs. GEORGE FLAGG Respondent	Filed November 8, 1979 CIVIL NO. 79-115-2 ORDER

This matter comes before the Court on a Petition to Enforce an Internal Revenue Summons.

This matter was presented to the Honorable Ron E. Longstaff, United States Magistrate, and on April 20, 1979, the said Magistrate filed his Report and Recommendation in this cause.

Thereafter the respondent filed a timely Application for Hearing on the Recommendation of the Magistrate. On July 18, 1979, pursuant to the Motion for Review of the Magistrate's Report

and Recommendation, a hearing was had wherein additional evidence was taken and the parties hereto were permitted to file additional briefs in support of their positions in this cause.

The Report of the Magistrate, the background and facts involved herein and the entire Report and Recommendation is hereby adopted, except for the recommendation on the bottom portion of page 7 of said Report.

As previously set out, the Magistrate's Report and Recommendation was filed on April 20, 1979. On April 6, 1979, some two weeks prior thereto, in the case of United States v. First National Bank of Dallas, the Honorable William M. Taylor, Jr., District Judge, ruled in an identical case. His opinion is set out in 468 F.Supp. 415 (N.D. Tex. 1979), and holds that where a taxpayer's return was selected for examination primarily for research purposes, the Petition for Enforcement

of the Summons issued to the taxpayers seeking access to the records pertaining to their accounts would be denied. In the First National Bank of Dallas case, the Revenue Agent testified at a hearing. He stated that the return of Dr. Yeoham was being examined under a taxpayer compliance program audit.[1]

---

[1]Section 4861.1(2) of the Internal Revenue Manual states as follows:

> (2) T[axpayer] C[ompliance] M[easurement] P[rogram]can be described as a scientific research system for meausrement and evaluation of taxpayer compliance characteristics. The major uses of TCMP data are to measure the levels of compliance and tax administration gaps necessary for formulation of the Service's long-term enforcement policies; to determine changes in compliance levels over a period of time to properly direct enforcement programs; to develop and improve return selection procedures (Discriminant Function); to improve the effectiveness of enforcement operations; to identify alternative methods of operation; and to achieve greater operating economies.

The background facts in the Bank of Dallas case are substantially the same as in

the case before us. In the Dallas case, the Internal Revenue Service was denied access to the books and records of Dr. Yeoham and thereafter Internal Revenue Service isued a summons to the bank. Upon notification by the Bank, as required by law, the intervenors stayed the summons and caused that civil action to be filed. As in this case, there was no dispute as to jurisdiction, and the Court after review of the pleadings and testimony concluded that it did have jurisdiction. This Court likewise concludes that it has jurisdiction.

In the First National Bank of Dallas case, the intervenors complained that the Internal Revenue Service was not allowed by law to examine returns for the purpose of carrying on a research. The Court at page 416 said that this contention is fully supported by the case of United States v. Humble Oil &

Refining Company, 488 F.2d 953 (5th Cir. 1974), vacated and remanded 421 U.S. 943, 95 S.Ct. 1670, 44 L.Ed. 2d 97 (1975), on remand 518 F.2d 747 (1975).[2] In the Humble Oil case, the Fifth Circuit held that the Internal Revenue Service was wanting to conduct a search, not an investigation, and concluded that Section 7602 of the Internal Revenue Code of 1954 only allowed investigations into the correctness of returns and did not allow research into compliance with Code provisions. The Bank of Dallas court, at page 417, states as follows:

> "As Dr. Yeoham's return was selected primarily for research purposes, this Court is compelled to conclude that Humble is controlling and the petition for enforcement should and will be denied."

The Court is appreciative of the Memorandum in Support of the Petition to Enforce the Internal Revenue Summons filed by the petitioners in this cause.

---

[2] On remand the Fifth Circuit held the summons was unauthorized.

That brief recognizes United States v. Humble Oil, and further recognizes the existence of United States v. First National Bank of Dallas. They then point out in the Government's brief that other cases have upheld summonses after T.C.M.P. examination, citing United States v. Fensterwald, 41 A.F.T.R.2d 78-935 (D.D.C., 1978); United States v. Waegemann, (C78-1212-RHS (N.D.Calif., 1978). The Government has provided the Court with copies of the Fensterwald and Waegemann cases and the Court has considered them but feels that the Bank of Dallas case more closely fits the issues before this Court.

The Court has been provided with a transcript of the hearing held April 3, 1979 before the Magistrate in this cause, and at that time Robert Beisner testified that he was an Internal Revenue Agent and had been since 1967; that his duties involved having returns assigned

to him for examination of the records of the taxpayer to determine the correctness of the tax as stated on the tax return. He stated that he had received the tax return of Mr. Flagg, and on pages 31 and 32 of the transcript of said hearing he says that "the sole reason for selecting Mr. Flagg's returns was to consider it in the Taxpayer's Compliance Measurement Program and that he had no other reason for examining the return." In the Government's brief, they state that:

> [T]he Government's position is that the summons was issued in connection with an investigation of the respondent's 1976 tax liability. As opposed to the Humble case, the purpose of the summons was and is to obtain information to determine respondent's correct tax liability for 1976. One immediate and undisputed reason why the IRS wants to determine respondent's correct tax liability is so that it can collect any additional tax that the respondent may owe. The purpose of collecting taxes is legitimate and valid. It completes the petitioners' prima facie case. (Petitioner's Brief, p. 4.)

This Court has no argument with the purposes set out in the above-mentioned

paragraph. However, according to the testimony of the Internal Revenue Agent who was handling the matter, this purpose was not included in his reasons for having the return and for calling the taxpayer in.

The Government attempts to differentiate between what the Revenue Agent Beisner said and what he may have had authority to say by citing the case of United States v. LaSalle National Bank, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed. 2d 221 (1978). In the LaSalle case, the facts are very similar to the case at bar. The Special Agent had issued a summons to the Bank to produce certain land trusts. The Bank appeared but refused to produce the files and the United States and the agent petitioned the district court for enforcement of the summons. The district court denied enforcement, finding that the summons was not issued

in good faith because they were issued solely for the purpose of unearthing evidence of criminal conduct by the taxpayer. The Court of Appeals affirmed. The Supreme Court held at page 298:

> "The District Court erred in refusing to enforce the summonses, since its finding that the agent was investigating the taxpayer 'solely for the purpose of unearthing evidence of criminal conduct' does not necessarily lead to the conclusion that the summonses were not issued in good-faith pursuant to the congressionally authorized purposes of §7602. ...
>
> Congress has not categorized tax fraud investigation into civil and criminal components but has created a tax enforcement system in which criminal and civil elements are inherently intertwined, and any limitation on the good-faith use of an IRS summons must reflect this statutory premise. ...
>
> To enforce a summons under §7602, the primary requirement is that it be issued before the IRS recommends to the Department of Justice the initiation of a criminal prosecution relating to the subject matter of the summons. This is a prophylactic rule designed to protect the standards of criminal litigation discovery and the role of the grand jury as the principal tool of criminal accusation. ...

> Enforcement of the summons is also conditioned upon the good-faith use of the summons authority by the IRS, which must not abandon its institutional responsibility to determine and to collect taxes and civil fraud penalties. That a single special agent intends only to gather evidence for a criminal investigation is not dispositive of the good faith of the IRS as an institution. Those resisting enforcement of a summons must disprove the actual existence of a valid civil tax determination or collection purpose by the IRS.
> ...
>
> On the record here, the respondents have not shown sufficient justification to preclude enforcement of the summonses in question, absent any recommendation to the Justice Department for criminal prosecution and absent any showing that the special agent already possessed all of the evidence sought in the summonses or that the IRS in an institutional sense had abandoned pursuit of the taxpayer's civil tax liability.

The cause was then reversed, with directions to remand.

This Court has fully considered the contentions of the Government as set out in their brief and in the LaSalle case and concludes that on the record here, the respondent has shown sufficient justification to preclude enforcement

of the summons. This is based on the statement of the Revenue Agent that his sole purpose was to further the Taxpayer's Compliance Measurement Program and for the further reason that in this case there is no evidence of any kind to indicate that the Government had any secondary purpose in pulling Mr. Flagg's tax return.[3]

---

[3] Q. You didn't have any other reason?

A. I had no other reason.

Q. This [the research program] was the sole reason for selecting Mr. Flagg's return?

A. Yes.

(1st Transcript, p.32, ll. 18-23).

This is further augmented by testimony of the taxpayer's son, (an attorney) on page 9 of the second transcript, line 8:

Q. Okay. And did you hear him at any time indicate that he was investigating your father for purposes of ascertaining a correct tax liability based on any deficiencies or any other criteria?

A. No, absolutely not.

Had there been any evidence to indicate that the investigation of Mr. Flagg was in any way connected with criminal activity or conduct, or that the IRS had any valid reason for a civil tax determination or for collection purposes, this Court would have to rule the other way. The LaSalle case specifically deals with the question of propriety of issuing a summons for the purpose of unearthing evidence of criminal conduct. The LaSalle decision really states that a summons may not be issued under §7602 in aid of a solely criminal investigation, but may be issued when a dual purpose was shown. There was no dual purpose here.

There is a discussion of the LaSalle decision in United States v. Richter, 603 F.2d 744, 747 (8th Cir. 1979).

> The court in LaSalle relates certain requirements that must be met for an IRS summons to be enforceable.
>
> First, the summons must be issued before the Service recommends to

> the Department of Justice that a criminal prosecution, which reasonably would relate to the subject matter of the summons, be undertaken. Second, the Service at all times must use the summons authority in good-faith pursuit of the congressionally authorized purposes of §7602. [United States v. LaSalle, supra, 437 U.S. at 318, 98S.Ct. at 2368.]

> Testimony adduced at trial reveals that the IRS fulfilled the LaSalle requirements to obtain enforcement of the summonses in question here. First, the IRS issued the summonses before recommending to the Department of Justice (Department) that a criminal prosecution against the intervenors be undertaken. Indeed, there still has been no recommendation that the Department prosecute the matter. In addition, IRS Special Agent Runge has yet to recommend such action to his supervisor or district chief. Second, the testimony discloses that the IRS issued the summonses to gather financial information about the intervenors so as to ascertain their potential tax liability. Consequently, the record supports the district court's determination that the IRS utilized its summons authority in good faith.

Here, in the case before this Court, a careful consideration of all of the evidence forces this Court to conclude that the second requirement of a valid summons has not been met. The taxpayer has disproved, by the admissions of the

Internal Revenue Service, the existence of a valid civil tax collection purpose and the Internal Revenue Service has admitted there is nothing to demonstrate a valid criminal tax collection service. Therefore there can be no dual purpose for the summons, only a research purpose which is not sufficient under the law.

In Humble Oil, supra, at page 947 the Court said:

> The two applicable statutes clearly indicate that Congress intended that a person or persons or particular returns be under scrutiny by the IRS before such a summons can be issued.

The matter before this Court now is whether or not the Internal Revenue Service had the authority to issue a summons in support of a §7601 Taxpayer's Compliance Measurement Program audit. The only evidence before the Court shows that at no time was Mr. Flagg under any criminal investigation, nor was his return selected for audit for any reason other

than the T.C.M.P. research function.

This Court does not dispute and is in full accord with the fact that the IRS can conduct audits simply to satisfy itself that the law is being obeyed as permitted by United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L. Ed. 2d 112 (1964), and this Court is also well aware of the fact that the case of United States v. Giordano, 419 F.2d 564 (8th Cir. 1969), cert. den. 396 U.S. 1037 (1970), permits the IRS to, in effect, go on a fishing expedition. This Court has no hesitancy to say that the IRS could in this case go on a fishing expedition, but according to the evidence before this Court, this was not their purpose.[4]

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[4]This Court is further aware that the Giordano case, and others, direct courts to liberally construe the Internal Revenue powers in favor of the government; however, "liberally construe" does not go so far as to say always uphold.

A short discussion of the thrust of §7601 and §7602 might be appropriate here. Section 7601 of the United States Code says that the Internal Revenue Service can request voluntary cooperation for any legitimate purpose concerned with the payment of federal income tax. That is not a compulsory section of the Code. The IRS can look, they can question, they can do whatever else they want, but they cannot force that information to be given by summons. Section 7602 says that if they are conducting an investigation and there is some reason to believe they need more information for investigative purpose as specifically set out in §7602, then the IRW has subpoena power. This subpoena power does not extend to §7601. The Taxpayer's Compliance Measurement Program clearly fits within §7601 and certainly does not fit within §7602. This is borne out in the case of United States

v. Biseglia, 420 U.S. 141, 95 S.Ct. 915, 43 L. Ed. 2d 88, where the Court states:

> The summons, in short, was issued pursuant to a genuine investigation. The Service was not engaged in researching some general problem. Its mission was not exploratory. The distinction between an investigative and more general exploratory purpose has been stressed appropriately by the federal courts, see, e.g., United States v. Humble Oil & Refining Co., 488 F. 2d 953, 958 (CA5 1974), pet. for cert. pending, No. 73-1827; United States v. Armour, 376 F.Supp. 318 (Conn. 1974), and that distinction is important to our decision here. Concurring opinion of Mr. Justice Blackmun, 420 U.S. at 152.

It is true that the Government states that their "position is that they are trying to conduct an investigation into Flagg's tax liability and that it is crystal clear from the focus of what Mr. Beisner is trying to do. He is trying to find out what the correct tax liability is from documents which were requested by summons."[5]

---

[5]The brief of the Government also goes on to say that "the central activity of the IRS in this case is and will be

(Footnote 5 continued)

to determine respondent's correct tax liability for 1976. The Humble case is simply not controlling here because the IRS is conducting a bona fide investigation." (Petitoner's Brief, p. 4.) However, a careful reading of the two transcripts--the original hearing and the hearing before this Court--does not give this Court adequate information or evidence to show that the IRS was in fact conducting a bona fide investigation.

This, however, is not backed by any testimony that is convincing to the Court. It is true that Mr. Beisner says at page 37 of the original transcript that the primary purpose of his action was to ascertain the correctness of the tax return. Then again on page 38 of the first transcript he says, "I would have to say that my primary purpose was examining the return for the correctness of the tax and the supplementary would have been the other item." The Court, however, feels that from the explanation of the purpose of the T.C.M.P. that these statements by Mr. Beisner were in effect

an effort to point out that while the "sole" purpose of ever looking at this taxpayer's return was the T.C.M.P. program, that after that choice was made, the person examining had a new purpose, to see if that return was correct. This is not the same as a dual purpose at the inception of the issuance as contemplated by LaSalle, supra, at page 6.

The recommendation of the Magistrate was sound. However, the Magistrate did not have the opportunity to consider the ruling in the case of United States v. First National Bank of Dallas, supra. That case is so closely aligned factually to this case that this Court feels that it cannot ignore it. It is true that this case is now on appeal, and should it be reversed of course the reliance on it would be other than well founded. However, absent a reversal, the Court feels that the decision is sound and

is on all fours with the problem that confronts this Court.

IT IS ORDERED that the Petition for Enforcement of the Summons is hereby denied. This cause is hereby dismissed.

/s/ Donald E. O'Brien

Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1018

UNITED STATES OF AMERICA, AND ROBERT BEISNER, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE,	*	
Appellant,	*	Appeal from the United States District Court for the Southern District of Iowa
vs.	*	
GEORGE E. FLAGG,	*	
Appellee.	*	

Submitted: September 9, 1980

Filed: November 13, 1980

Before LAY, Chief Judge, GIBSON, Senior Circuit Judge, and HEANEY, Circuit Judge.

GIBSON, Senior Circuit Judge.

The United States appeals the decision of the District Court denying enforcement of an Internal Revenue Service (IRS) summons issued to George Flagg. This case

involves the question of whether the IRS has statutory power under 28 U.S.C. §7602 (1976) to issue a summons to an identified taxpayer to determine the correctness of his return, in order that the data developed from the audit may be used for research purposes in the IRS's Taxpayer Compliance Measurement Program (TCMP). We hold that the IRS does have statutory authority to issue the summons. We therefore reverse the District Court and remand with instructions to enforce the summons.

I.

On or about April 5, 1978, George Flagg, an attorney, was contacted by Robert Beisner, a revenue agent for the IRS. Beisner informed Flagg that his 1976 tax reutrn would be audited since it had been selected for the TCMP. Flagg objected to participation in the program. In subsequent meetings with the IRS,

Flagg refused to participate in the examination of his return. On September 27, 1978, the IRS issued a summons to Flagg to appear before Beisner with records to substantiate his 1976 return. Flagg refused to comply. On March 6, 1978, the IRS filed a petition for enforcement in the District Court. On November 8, 1979, the District Court, after hearings before a magistrate and the court, denied enforcement of the summons. This appeal followed.

II.

The Taxpyer Compliance Measurement Program is designed to measure and evaluate how taxpayers comply with the Internal Revenue Code reporting requirements. Under this program, a number of taxpayers are randomly selected by a computer. The IRS then makes an extensive examination of these taxpayers' returns in order to ascertain the correctness of their returns.

The examinations are in-depth, and more extensive than ordinary audits. The results of these audits, in addition to being used in accordance with normal IRS enforcement procedures (such as providing a refund for excess payments or assessing a deficiency for taxes due) are used as data for the TCMP research program, the purpose of which is to improve the overall efficiency of the administration of the income tax laws.

The TCMP is a quality control program which attempts to pinpoint those areas of the tax law where errors will be most frequently made in filing a return. In order to implement the TCMP an unbiased, random sample of the correctness of several thousand individual taxpayers' returns is needed to form the proper statistical data base. The IRS, by extensively auditing these returns, can predict which areas of the tax law millions of United States

taxpayers may be having difficulty complying with. In so doing, the IRS can obviate the need to engage in costly, extensive examinations of taxpayers in areas of the tax law where the TCMP has shown that taxpayers encounter little difficulty. The TCMP thus aids the IRS in determining those areas of tax administration into which it should concentrate its limited enforcement resources. Both the taxpayers and the IRS gain from the efficiencies resulting from the TCMP.

III.

George Flagg was one of those individuals whose 1976 tax returns were selected to be examined for correctness in order that the data obtained from the audits might be included in the TCMP. On or about April 5, 1978, Flagg was first contacted by Robert Beisner, the revenue agent for the IRS. There is considerable dispute over whether Beisner informed

Flagg during this and subsequent conversations that his return was to be audited to determine its correctness or to provide data for the TCMP research project. Beisner himself testified at the magistrate's hearing in a somewhat conflicting manner on this question. At the hearing before the District Court judge, however, Flagg's attorney addressed the conflict or dichotomy in Beisner's testimony:

> The dichotomy that you're [the district court judge] concerned about, sir, Mr. Beisner is correct in both instances. The sole purpose [of the examination] was the TCMP. But his [Beisner's] sole purpose as the lower echelon of government was merely to ascertain the correctness of tax liability previously paid by Mr. Flagg, so that this could be put into the TCM Program. * * * It was an investigation, an audit to put the information into the TCM Program.
>
> As a secondary purpose, obviously, if they [the IRS] found anything wrong, they would correct it. * * *
>
> So it's not an either/or; but Mr. [Biesner] is not confusing himself when he testifies both ways. The sole purpose of the TCM Program, his function within that program, was to audit and determine whether or

not Mr. Flagg's return was correct.

The attorney correctly states the factual circumstances attendant to the attempted examination of Flagg's return. We find on reviewing the record: (1) IRS agent Beisner was attempting to examine Flagg's return to determine its correctness; (2) Flagg's return was randomly selected by the IRS for examination to determine its corectness primarily in order to provide data for the TCMP research program.

In our reading of the District Court's opinion, that court did not come to a contrary conclusion. The District Court, rather, focused on the conclusion that "the investigation of Mr. Flagg was [not] in any way connected with criminal activity or conduct, or that the IRS had <u>any valid reason for a civil tax determination</u> or for collection purposes, * * *." (Emphasis added). The underscored conclusion is a finding of law by the

District Court that examination of Flagg's return to determine its correctness, primarily in order to provide data for the TCMP, is not "a valid reason for a civil tax determination" under 26 U.S.C. §7602. See generally United States v. LaSalle National Bank, 437 U.S. 298, 319 n.21 (1978). We disagree.

IV.

A.

The relevant statutory framework for this case can be found in sections 7601 and 7602 of the Internal Revenue Code of 1954. Section 7601 imposes a statutory duty on the Secretary to canvass the accuracy of tax returns filed and the liability of those who made or should make a return. It reads:

> Section 7601. Canvass of districts for taxable persons and objects.
>
> (a) General rule.
>
> The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from

> time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

Section 7602 gives statutory procedures for checking returns for errors and omissions. It reads:

> Section 7602. Exmination of books and witnesses.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized--
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such

> books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Flagg does not contend that the IRS lacks statutory authority under Section 7601 to set up the TCMP program. See United States v. Humble Oil & Refining Co., 488 F.2d 953, 956, 962 (5th Cir. 1974), vacated and remanded, 421 U.S. 943 (1975), aff'd per curiam, 518 F.2d 747 (5th Cir. 1975). Section 7601 "flatly imposes upon the Secretary [of the Treasury] the duty to canvass and to inquire." Donaldson v. United States, 400 U.S. 517, 523 (1971). Thus, section 7601 gives the Internal Revenue Service a broad mandate to investigate and audit. United States v. Bisceglia, 420 U.S. 141, 145 (1975); see United States v. Euge, 444 U.S. 707, 716 (1980).

Flagg contends the IRS is without statutory authority to effectuate the purpose of section 7601 through the issuance of a summons.[1] Section 7602 provides the statutory power to the IRS to summon the taxpayer to appear before it with "such books, papers, records, or other data, and to give such testimony, under oath as may be relevant or material to" determining "the correctness of any return." This investigative authority "is not limited to situations in which there is probable cause, in the traditional sense, to believe that a violation of the tax law exists. United States v. Powell, 379

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[1] In his brief, Flagg argues that the Government is asserting statutory authority under section 7602 for the first time on appeal. The District Court record and its opinion clearly reveal otherwise.

U.S. 48 (1964)." United States v. Bisceglia, supra, 420 U.S. at 146.

In construing the summons authroity claimed under section 7602, judicial deference to congressional intent requires that if the claimed authority is necessary for the effective performance of the congressionally imposed responsibilities to enforce the tax laws, "that authority should be upheld absent express statutory prohibition or substantial countervailing policies." United States v. Euge, supra, 444 U.S. at 711; e.g., United States v. Bisceglia, supra, 420 U.S. 141; Donaldson v. United States, supra, 400 U.S. 517.

Applying these principles the IRS clearly has broad authority to summon Flagg to appear to ascertain the correctness of his return. Furthermore, the section 7601 canvassing power of the IRS would be frustrated if the section 7602 summons authority were construed to be subject to

a limitation against such examinations in cases where the primary purpose was to gain research data. See United States v. Euge, supra, 444 U.S. at 715, quoting United States v. Bisceglia, supra, 420 U.S. at 150.

The TCMP serves the legitimate purpose of increasing the effectiveness of the IRS's enforcement powers. The program also substantially reduces the burden on many taxpayers whose returns may be subject to audit. The results of the TCMP predict which areas of the tax law are more difficult to comply with, thereby reducing the time spent in auditing those areas in the least need of external enforcement. Our tax system is based on the principal of voluntary compliance by the individual taxpayer; the TCMP furthers that principle.

B.

The finding that the IRS has statutory authority under the summons power to ascertain the correctness of Flagg's return in order to primarily provide data for the TCMP research program is subject to the limitation of a good faith exercise. In United States v. Powell, 379 U.S. 48, 57-58, quoted in United States v. LaSalle National Bank, 437 U.S. 298, 313-14 (1978), the Supreme Court outlined several elements of a good-faith exercise:

> [The Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed * * *. [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. [Footnote omitted.]

In Flagg's case we have already found that the IRS was examining Flagg's return in order to ascertain its correctness and thereby obtain information for its canvassing activities in the form of the TCMP research activity. This is clearly a legitimate purpose under sections 7601 and 7602. Flagg does not allege that the summons was issued for harassment, criminal enforcement, or any other potentially illegitimate purpose.[2] Accordingly, we find the IRS has met its good-faith obligation in the issuance of the summons. See United States v. Powell, supra, 379 U.S. at 56-58; 28 U.S.C. §7605(b)(1976).

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[2]Those opposing enforcement of a summons bear the burden "to disprove the actual existence of a valid civil tax determination or correction purpose by the Service." United States v. LaSalle National Bank, supra, 437 U.S. at 316

V.

Flagg argues extensively in his brief that a decision of the United States Court of Appeals for the Fifth Circuit should be controlling in this case. United States vs. Humble Oil & Refining Co., 488 F.2d 953 (5th Cir. 1974), vacated and remanded, 421 U.S. 943 (1975) (in light of United States v. Bisceglia, 420 U. S. 141 (1975)), aff'd per curiam 518 F.2d 747 (5th Cir. 1975). The District Court also relied upon this decision. See also United States v. First National Bank in Dallas, 468 F.Supp. 415 (N.D. Tex. 1979), appeal docketed, No. 79-2420 (5th Cir. June 14, 1979). We find that Humble Oil, by its own wording, is limited to a situation not involved herein and therefore is inapplicable to the present case.

In Humble Oil the IRS had issued a "John Doe" summons to the oil company

in order to discover the identities of all lessors of mineral leases surrendered by the company in 1970. The summons was not issued to facilitate any ongoing investigation of any particular taxpayer, either of Humble or of its lessors. The Fifth Circuit denied enforcement of the summons, despite finding that the IRS's investigation was a valid IRS function under the section 7601 canvassing power. In denying enforcement, the court focused upon the absence of any particularized investigation of an individual taxpayer, which the court found to be a prerequisite under section 7602. The Court stated that:

> the canvass power can be employed [by the IRS] rather cavalierly while the summons power can be utilized only when IRS scrutiny of a taxpayer or a group thereof becomes particularized or focused. We agree with the district court that '[t]here must be some nexus between information sought and a specific investigation of specific individuals before the government can compel third parties, at their own expense, to give information to the Internal Revenue Service.'

> United States v. Humble Oil & Refining Company, 346 F. Supp. 944, 947 (S.D. Tex. 1972). Before a section 7602 summons may issue, the IRS must have traversed the data gathering stage and initiated an investigation.

United States v. Humble Oil & Refining Co., supra, 488 F.2d at 960.

The court in Humble Oil reiterated this factual distinction no fewer than three times in its opinions. Id. at 956, 962-63; 518 F.2d at 748. The Humble Oil decision, therefore, does not stand for the broad proposition "that the Internal Revenue Service is not allowed by law to examine returns for the purpose of carrying on research" as contended by the District Court in United States v. First National Bank in Dallas, supra, 468 F. Supp. at 416. In Flagg's case, the IRS was attempting to conduct a lawful examination of his individual return. The authority to issue a summons to determine the correctness of an individual return

fits squarely with the statutory provision of section 7602. The IRS in this instance was attempting to determine the correctness of Flagg's return. By determining the accuracy or inaccuracy of Flagg's return and others selected in a similar manner, a proper statistical base can be compiled from which relevant information may be gained. This information can in turn be used to increase the efficiency of the IRS and ultimately lessen the burden of complying with the tax laws and related regulations.

Reversed and remanded with instructions to enforce the summons.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

GEORGE E. FLAGG

Petitioner

vs.

UNITED STATES OF AMERICA
AND ROBERT BEISNER,
REVENUE AGENT OF THE
INTERNAL REVENUE SERVICE

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOSEPH G. BERTOGLI
605 Savings & Loan Bldg.
Des Moines, Ia 50309
(515) 243-1188

ATTORNEY FOR PETITIONER

TITLE 26 UNITED STATES CODE, SECTION 7601.

Canvass of districts for taxable persons and objects.

(a) General rule. The Secretary shall, to the extent he deems it practicable, cause officers or employess of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all person owning or having the care and management of any objects with respect to which any tax is imposed.

(b) Penalties. For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.

TITLE 26 UNITED STATES CODE, SECTION 7602.

Examination of books and witnesses.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear

before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

No. 80-1359

MAR 20 198
ALEXANDER L. STE
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE E. FLAGG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

United States v. *Bisceglia*, 420 U.S. 141 4

United States v. *Euge*, 444 U.S. 707 3

United States v. *First National Bank in Dallas*, 635 F. 2d 391 4

United States v. *Hallmark Carpet Mills*, CV 80-5474 MRP (TX) (C.D. Cal. Jan. 16, 1981) 5

United States v. *Humble Oil & Refining Co.*, 488 F. 2d 953, vacated and remanded, 421 U.S. 943, aff'd per curiam, 518 F. 2d 747 4

United States v. *LaSalle National Bank*, 437 U.S. 298 3

United States v. *Mercantile Trust Co.*, No. 80 Misc. 071 (E.D. Mo. Dec. 31, 1980) 4

Statute:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7601 3

Section 7602 ..... 1, 2, 3, 4

Section 7801 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1359

GEORGE E. FLAGG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented is whether the court of appeals correctly held that the Internal Revenue Service has the authority under Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), to issue a summons in aid of an investigation of a particular taxpayer when, in addition to a determination of the correctness of the taxpayer's federal income tax return, the information obtained is also used for statistical purposes by the Internal Revenue Service to measure taxpayer complaince.

The pertinent facts may be summarized as follows: Petitioner's federal income tax return for 1976 was selected for audit under the Internal Revenue Service's Taxpayer Compliance Measurement Program (TCMP). The TCMP is designed to measure and evaluate how taxpayers comply with the Internal Revenue Code reporting requirements. Under this program, a number of taxpayers are randomly

selected and their tax returns are examined to ascertain the correctness of the returns and to determine the taxpayer's tax liability. In addition to using the results of these audits in accordance with normal enforcement procedures, they are also used to improve the Internal Revenue Service's administration of the revenue laws and to identify statistically those returns which should be selected for audit. If an audit conducted under the TCMP indicates that the taxpayer has additional tax liability, appropriate procedures are instituted to collect the tax, or if the audit indicates an overpayment, refund is made, just as in any other case (Pet. App. A23-A26).

The summons here was issued to petitioner to obtain business records relating to his income and expenses for 1976 (Pet. App. A24). Petitioner refused to comply. The district court denied enforcement of the summons, holding that the Internal Revenue Service did not have the authority under Section 7602 to issue a summons to aid in an investigation when the return was selected for audit in connection with the TCMP (Pet. App. A2-A21).

The court of appeals reversed (Pet. App. A22-A40). It held that the Internal Revenue Service has the statutory authority to issue a summons in aid of an investigation as long as one of the purposes for the investigation is authorized by Section 7602. Because it is undisputed that one of the purposes for the investigation was to determine the correctness of petitioner's income tax liability, a purpose expressly authorized by Section 7602, the court concluded that the summons must be enforced, even though the results of the investigation would also be used for other tax enforcement purposes.

1. The court of appeals correctly held that the summons in this case was properly enforceable.

The Secretary of the Treasury and the Commissioner of Internal Revenue are charged with the responsibility of enforcing and administering the Internal Revenue Code. To this end, Section 7601 of the Code directs the Secretary to canvass and inquire after all persons who may be liable to pay any internal revenue tax. Section 7602 of the Code gives the Secretary the authority, consistent with the mandate in Section 7601, to issue a summons where necessary to ascertain the correctness of any return, to make a return where none has been filed, and to determine the internal revenue tax liability of any person. In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court held that the Internal Revenue Service has the authority to issue a summons if one of the purposes for the investigation is authorized under Section 7602, even though the information obtained by the use of a summons may subsequently prove useful in a criminal investigation. See also *United States* v. *Euge*, 444 U.S. 707, 711 (1980). Here, it is undisputed that the summons was issued to determine the correctness of petitioner's return. Only when the correctness of the return has been determined is the information obtained from the investigation useful in the Taxpayer Compliance Measurement Program (Pet. App. A25-A26). Accordingly, the court of appeals correctly ordered the summons enforced.

Contrary to petitioner's argument (Pet. 8-10), the random selection of returns under the Taxpayer Compliance Measurement Program does not exceed the IRS's express authority to administer and enforce the Internal Revenue Code (Section 7801 of the Code), and to inquire after all persons who may be liable to pay any internal revenue tax. Section 7601 of the Code. As the court of appeals noted (Pet. App. A26), "[t]he TCMP * * * aids the IRS in determining those areas of tax administration into which it should concentrate its limited enforcement resources. Both

the taxpayers and the IRS gain from the efficiencies resulting from the TCMP." Accordingly, there is no evidence to show, or even any reason to suggest, that returns randomly selected under the Taxpayer Compliance Measurement Program are selected for any improper purpose.

2. Petitioner further suggests (Pet. 15-19) that the decision below conflicts with *United States* v. *Humble Oil & Refining Co.*, 488 F. 2d 953 (5th Cir. 1974), vacated and remanded, 421 U.S. 943 (1975), aff'd per curiam, 518 F. 2d 747 (1975). There, the court declined to enforce an internal revenue summons to obtain information where "the primary purpose of the project was research" (518 F. 2d at 748) with respect to the level of taxpayer compliance with a particular Internal Revenue Service rule. See also *United States* v. *Bisceglia*, 420 U.S. 141, 151-152 (1975) (Blackmun, J., concurring). But the Fifth Circuit subsequently held in *United States* v. *First National Bank in Dallas*, 635 F. 2d 391 (1981), that the Internal Revenue Service has the authority under Section 7602 to issue a summons in the investigation of a return selected for audit under the Taxpayer Compliance Measurement Program. The court there expressly disavowed the interpretation of its previous holdings in *Humble Oil* advanced by petitioner in this case, holding "that information obtained pursuant to a summons issued under section 7602 may be used for research purposes if the summons is issued in aid of an investigation of the tax liabilities of a specific taxpayer * * *"[1] (635 F. 2d at 395). See also *United States* v. *Mercantile Trust Co.*, No. 80 Misc. 071 (E.D. Mo. Dec. 31, 1980) (summons issued to investigate a return selected for audit under the TCMP

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[1] *United States* v. *Bisceglia*, 420 U.S. 141 (1975), does not suggest a different result. This Court there ordered enforcement of a "John Doe" summons when it was determined that the Internal Revenue Service was investigating a party to a commercial transaction whose identity was unknown.

enforced); *United States v. Hallmark Carpet Mills*, CV 80-5474 MRP (TX) (C.D. Cal. Jan. 16, 1981), appeal pending, No. 81-5059 (9th Cir. (same).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

DOJ-1981-03